Supreme Court, U.S.
FILED
APR 18 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-1494

STATE OF MISSISSIPPI

Petitioner

v.

EARL WESLEY BERRY

Respondent

ORIGINAL

CERTIFICATE OF SERVICE OF RESPONDENT'S
MOTION TO PROCEED IN FORMA PAUPERIS

This is to certify that a true and correct copy of the above and foregoing Motion to Proceed in Forma Pauperis was this date posted via first class mail, postage prepaid, to Marvin L. White, Assistant Attorney General, P.O. Box 220, Jackson, MS 39205, telephone number (601) 359-3680.

This the 18th day of April, 1991.

JAMES W. CRAIG
P.O. Box 510
Jackson, Mississippi 39205
(601) 352-0784

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

No. 90-1494

STATE OF MISSISSIPPI

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EARL WESLEY BERRY

Respondent

MOTION TO PROCEED IN FORMA PAUPERIS

The Respondent, EARL WESLEY BERRY, by and through his attorneys, James W. Craig and David O. Bell, hereby asks leave to file the attached Opposition to Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Respondent was granted leave to proceed in forma pauperis on his appeal to the Mississippi Supreme Court. An affidavit of indigency meeting the requirements of Form 4, Federal Rules of Civil Procedure is attached as an exhibit to this Motion.

Dated: April 18, 1991.

DAVID O. BELL
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(601) 234-5058

JAMES W. CRAIG*
P.O. Box 510
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Attorneys for Mr. Berry

*Counsel of Record

IN THE SUPREME COURT OF THE UNITED STATES

NO. 90-1494

STATE OF MISSISSIPPI — PETITIONER

VS.

EARL WESLEY BERRY — RESPONDENT

AFFIDAVIT OF EARL WESLEY BERRY

STATE OF MISSISSIPPI
COUNTY OF SUNFLOWER:

PERSONALLY APPEARED BEFORE ME, the undersigned authority in and for the jurisdiction aforesaid, the within named EARL WESLEY BERRY, who being by me first duly sworn, stated as follows:

My name is EARL WESLEY BERRY. I am the respondent in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe that I was entitled to the relief granted to me by the Mississippi Supreme Court.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? No.

   State the date of your last employment and the amount of the salary and wages per month which you received:

   December 1987 -- app. $900/month

2. Have you received within the last twelve months amy income from a business, profession, or other form of

self-employment, or in the form of rent payments, interest, dividends, or other source? No

a. If the answer is yes, describe each source of income and state the amount received from each during the last twelve months: _____

3. Do you own any cash or checking or savings account? Yes

a. If the answer is yes, state the total value of the items owned: less than $100 - pension acct.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing?) No

5. List the persons who are dependent upon you for support and state your relationship to those persons: None

I understand that a false statement or answer to any questions on this affidavit will subject me to penalties for perjury.

This the 17th day of April, 1991.

Earl W Berry
EARL WESLEY BERRY

SWORN TO AND SUBSCRIBED before me, this the 17th day of April, 1991.

Andi de Ley
NOTARY PUBLIC

MY COMMISSION EXPIRES:

Oct. 17, 1994

Supreme Court, U.S.
FILED
APR 18 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

No. 90-1494

STATE OF MISSISSIPPI

Petitioner

v.

EARL WESLEY BERRY

Respondent

ORIGINAL

CERTIFICATE OF SERVICE OF RESPONDENT'S
OPPOSITION TO PETITION FOR CERTIORARI

This is to certify that a true and correct copy of the above and foregoing Opposition to Petition for Writ of Certiorari was this date posted via first class mail, postage prepaid, to Marvin L. White, Assistant Attorney General, P.O. Box 220, Jackson, Mississippi 39205, telephone number (601) 359-3680.

This, the 18th day of April, 1991.

JAMES W. CRAIG
P.O. Box 510
Jackson, Mississippi 39205
(601) 352-0784

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

No.-90-1494

STATE OF MISSISSIPPI

Petitioner

v.

EARL WESLEY BERRY

Respondent

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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SUPREME COURT, U.S

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IN THE SUPREME COURT OF THE UNITED STATES

No. 90-1494

STATE OF MISSISSIPPI	)
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v.	)
EARL WESLEY BERRY	)
Respondent	)

OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

COMES NOW, EARL WESLEY BERRY, and respectfully files the following opposition to the State of Mississippi's Petition for a Writ of Certiorari to the Supreme Court of Mississippi (hereinafter "Petition").

A. INTRODUCTION.

The Supreme Court of Mississippi affirmed Respondent's conviction for capital murder, but reversed his sentence of death. See, Berry v. State, 575 So.2d 1 (Miss. 1990). Respondent had been indicted as an habitual offender, meaning that if he were sentenced to life in prison he would have to serve life without possibility of parole. Id at 13. Miss. Code Ann. § 99-19-81. The Court held that while, ordinarily, parole is speculative, here, where the status hearing was held prior to the sentencing phase, there was no uncertainty as to the defendant's ineligibility for parole and the jury should have been so informed. Berry at 13.

Petitioner, the State of Mississippi, now seeks review by this Court. There are a number of reasons why the petition for certiorari should not be granted.

B. REASONS WHY CERTIORARI SHOULD NOT BE GRANTED.

There are two distinct species of "adequate and independent state law ground" -- one, where the judgement of the state court is actually predicated on state law, rather than the federal constitution. See, e.g., Michigan v. Long, 463 U.S. 1032, 1041-42, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). Two, where there exist other reasons why the conviction or sentence was reversed, rendering the state court ruling on a particular issue unnecessary to the ultimate decision. See, Ohio v. Huertas, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 837 (1991) (declining to review the continuing vitality of Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987)).

The presence of both these "types" of independent ground in the decision below render the case an inappropriate subject for certiorari review.

1. The Supreme Court of Mississippi has ruled that the issue presented by Petitioner should be resolved on State Law grounds.

It is true that the lower court failed to make it clear in Berry whether the decision was predicated on state or federal grounds. However, in the subsequent decision of Mackbee v. State, 575 So.2d 16 (Miss. 1990), the Mississippi Supreme Court clarified this ambiguity:

> We emphasize that we only refer to federal authorities for illustrative purposes. The

> conclusions that we reach are based on the State Constitution.

Id. at 38, n. 11 (citing Michigan v. Long, 463 U.S. 1032, 1042, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983)).

Petitioner properly notes as much in a footnote:

> In Mackbee, the court below attempts to evade review of this question by stating in a footnote that the federal authorities cited are for illustrative purposes only and that the case is decided under the state constitution.

Petition, at 16 n. 3.

Petitioner does not stop there, however. "This statement," Petitioner continues, "has no application to the case at bar as the case sub judice is clearly based solely on federal constitutional law." Id., at 16, n. 3. This is not the law. As this Court explicitly stated in Michigan v. Long:

> The jurisdictional concern is that we not "render an advisory opinion, and if the same judgement would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Id., at 463 U.S. at 1042 (quoting Herb v. Pitcairn, 324 U.S. 117, 126, 65 S.Ct. 459, 89 L.Ed.2d 789 (1945)).

In discussing whether a jury should be provided accurate information regarding probation or parole, this Court has held that "[i]t is elementary that States are free to provide greater protections in their criminal justice system that the Federal Constitution requires." California v. Ramos, 463 U.S. 992, 1013, 103 S.Ct 3446, 77 L.Ed.2d 1171 (1983). Whatever the merits of the

federal claim, the Mississippi Supreme Court has accepted the invitation to decide the case on state law grounds. Thus, no federal question is presented for review.

2. Since another issue in this case required reversal of the death sentence, there probably exists another adequate ground for this decision.

Another issue presented to the court below would, most likely, have resulted in the reversal of the death sentence regardless of the disposition of the habitual offender issue. "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." Jean v. Nelson, 472 U.S. 846, 854, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985) (quoting Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 664 (1944)).

In the instant case, the jury was given the aggravating circumstance "especially heinous, atrocious or cruel," but it was unaccompanied by a limiting definition. This, the lower court stated, "fail[ed] to adequately channel the jury's discretion [in violation of] Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)." Berry, at 14. While the Mississippi Supreme Court has not yet made clear whether this error will result in a resentencing trial[1], absent some ruling on this question, this

[1] See, Clemons v. Mississippi, 494 U.S. ___, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (remanding for a determination whether, under state law, the court will conduct a reweighing of the evidence, excluding an invalid aggravating circumstance).

Court's exercise of jurisdiction in this case may well prove futile.

II. THERE EXISTS NO CONFLICT IN THE CIRCUITS ON THIS ISSUE SUCH THAT CERTIORARI SHOULD BE GRANTED.

In an effort to fabricate a conflict in the lower courts, Petitioner cites O'Bryan v. Estelle, 714 F.2d 365 (5th Cir. 1983), cert. denied sub nom. O'Bryan v. McKaskle, 465 U.S. 1013, 104 S.Ct. 1015, 79 L.Ed.2d 245 (1984), as the antithesis of the holding in Berry v. State. Under even passing scrutiny, it is apparent that the cases are not in conflict. In O'Bryan, the Texas trial court had instructed the jury in no uncertain terms not to take parole into consideration. Id. at 388 n. 21. This was, perhaps, the most the defense could hope for since there was no allegation that the defendant would not have been eligible for parole in the future.

Under these circumstances, the Fifth Circuit held that there was no need for an instruction "about the law governing the Board of Pardons and Paroles in relation to inmates sentenced to life imprisonment . . . ." Id. at 388. If an accurate instruction had told the jury that the defendant would be eligible for parole at some future date, the instruction would not have done the defense much of a favor. To the contrary, it is clear that the defendant would benefit from an accurate, categorical statement that he will never be considered for pardon or parole.

In the other case cited by Petitioner, the en banc Fifth Circuit found itself procedurally barred from considering the issue presented in O'Bryan. See King v. Lynaugh, 850 F.2d 1055, 1056 n. 1 (5th Cir. 1988) (en banc), cert. denied, 488 U.S. 1019, 109 S.Ct.

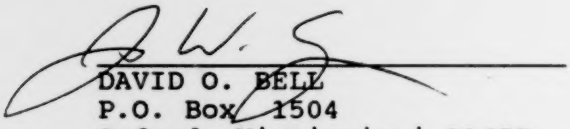
1564, 102 L.Ed.2d 809 (1989). Thus, the Fifth Circuit has not been asked to consider the issue presented in this case. Before taking the question on certiorari, this Court should wait to see if a bona fide conflict ever actually arises, rather than accept the chimerical "conflict" offered by Petitioner.

To be sure, a conflict between the federal courts of appeal and the state high courts may occasionally provide the basis for certiorari jurisdiction. See, e.g., Lakeside v. Oregon, 435 U.S. 333, 336 n. 3, 98 S.Ct. 1091, 55 L.Ed.2d 319 (1978) (decisions of three circuits in conflict with decisions of two circuits and four state courts). Nevertheless, this Court does not have the time or the resources merely to mollify dissatisfied litigants who feel -- perhaps wrongly -- that a state court erroneously decided an issue; certiorari must be reserved for the "conflict[] among jurisdictions over an issue which imperatively demand[s] a single uniform rule [and therefore] commands this Court's immediate attention." Brown Transportation Corp. v. Atkon, 439 U.S. 1014, 99 S.Ct. 626, 58 L.Ed.2d 687 (1987) (citation omitted; emphasis supplied) (White and Blackmun, JJ. dissenting from denial of certiorari).

CONCLUSION

Wherefore, Mr. Berry respectfully suggests that it would be improvident to grant certiorari in this case.

Respectfully submitted,



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April 18, 1991

Hon. William K. Suter
Clerk, U.S. Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Re: Mississippi v. Berry, No. 90-1494

Dear Sir:

Enclosed for filing in the above styled case please find the original and one copy of Respondent's Opposition to Petition for Writ of Certiorari and Respondent's Motion for Leave to Proceed in Forma Pauperis, together with the appropriate certificates of service therefor.

Thank you for filing these documents.

Sincerely,

James W. Craig
Attorney for Earl Berry

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SUPREME COURT, U.S.